

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DORIS BROWN,)	
Plaintiff,)	Civil Action No.: 7:03cv00669
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
ANTHONY J. PRINCIPI,)	By: Samuel G. Wilson
SECRETARY OF DEPARTMENT)	United States District Judge
OF VETERANS AFFAIRS,)	
Defendant.)	

This is an employment discrimination action brought under Title VII, in which Doris Brown alleges race discrimination, gender discrimination, and retaliation in connection with her employer's denial of her application for a promotion. The defendant has moved for summary judgment. Brown has failed to participate in discovery, failed to appear at pre-trial hearings, and ignored the scheduled trial date, and the court, therefore, finds her derelict in prosecuting her case and dismisses the case pursuant to Federal Rule of Civil Procedure 41(b). Because involuntary dismissal is a drastic measure, the court alternatively addresses the merits of the defendant's motion for summary judgment. Finding no genuine issue of material fact, the court holds that the defendant is entitled to judgment as a matter of law.

I.

Brown is an African-American female nurse employed by the Veterans Affairs Medical Center (VAMC) in Salem, Virginia. She claims that a recommendation made by the Nurse Professional Standards Board (NPSB) not to promote her was motivated by discriminatory and retaliatory intent. The Department of Veterans Affairs provides regulations establishing the criteria for promotion,

including the qualifications required for each nursing level. The NPSB recommended against a promotion because Brown “lack[ed] the nursing practice requirements” of the Nurse IV position. The NPSB that recommended against a promotion was comprised of an African-American male, a white male, and an African-American female. Each member of the NPSB signed a declaration that they did not know Brown.

After exhausting administrative remedies, Brown filed this suit pro se on October 17, 2003. The court entered a scheduling order on February 24, 2004, setting trial for August 26-27, 2004. Brown failed to serve the defendant with any initial discovery or to respond to the defendant’s discovery requests. The defendant moved for summary judgment on June 24, 2004, contending that Brown had failed to set forth a prima facie case of discrimination because she could not produce evidence of discriminatory intent, and that Brown could not produce evidence to show that the defendant’s legitimate nondiscriminatory reason for denying her promotion was a pretext for discrimination. The Clerk issued a standard Roseboro notice, informing Brown of her obligation to respond within twenty days. Brown filed a request for extension of time to respond, noting that she had hired legal counsel to assist her. In a conference call on July 27, 2004, this court directed Brown’s counsel to file a response to the summary judgment motion by July 29, 2004. No response to defendant’s summary judgment motion has been filed to date.

While no counsel of record ever appeared for Brown, the record shows that defendants corresponded with Lisa Ward, of Ellicott City, Maryland, regarding her representation of Brown in this action. Despite repeated attempts by the defendant’s counsel to confer with Ward, she never responded to discovery requests, nor did she submit initial disclosures. The defendant filed a motion to

compel discovery on July 29, 2004, certifying that defendant's counsel had in good faith attempted to confer with Ward. On August 10, 2004, defendant noted its objection to Brown presenting evidence at trial because Brown had failed to file any information concerning the evidence she intended to present at trial, as required by Rule 26. Neither Brown nor Ward, who were both given notice, appeared for the August 19 pre-trial motions hearing.

II.

The court finds that because Brown failed to comply with discovery, failed to file a responsive brief, failed to appear at pretrial hearings and essentially ignored the scheduled trial date, dismissal is justified under Rule 41(b). The court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. See, e.g., Herbert v. Saffell, 877 F.2d 267, 270 (4th Cir. 1989). Here, both Brown and her counsel were aware of the need to respond to defendant's motion for summary judgment. In addition, correspondence in the record establishes that defendant's counsel repeatedly tried to communicate with Brown's counsel regarding discovery and that Brown has failed to comply with any discovery requests, or even participate in discovery. The defendant has incurred considerable time and expense due to Brown's delays. Finally, both Brown and her counsel are aware of the potential consequences of their failure to cooperate. The court finds that Brown has been derelict in fully prosecuting her case and that the sanction of dismissal is appropriate.

III.

The court has found that Brown's continued lack of attention to her claim permits involuntary

dismissal. However, in the alternative, the court addresses defendant's motion for summary judgment on the merits. In that regard, Brown has failed to raise a genuine issue of material fact that defendant's articulated reason for not promoting her was a pretext for discrimination or retaliation. Accordingly, the court grants defendant's motion for summary judgment.

A moving party is not automatically entitled to summary judgment if the opposing party has failed to respond. Rather, "the court...must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law." Custer v. Pan American Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993). Nevertheless, "the failure of a party to respond to a summary judgment motion "may leave uncontroverted those facts established by the motion." Id. The court is therefore permitted to accept defendant's evidence as undisputed.

Assuming, without deciding, that Brown has successfully set forth a prima facie case of discrimination or retaliation, she has failed to produce evidence that the defendant's articulated reason for denying her promotion was a pretext. Under the McDonnell Douglas burden-shifting framework, when the defendant has offered a nondiscriminatory reason for the disputed employment action, the burden shifts back to the plaintiff to offer probative evidence that the proffered explanation is merely a pretext for discrimination or retaliation. 411 U.S. 792, 802-04 (1973). Where a plaintiff fails to show a genuine factual dispute over the employer's legitimate non-discriminatory explanation, defendant is entitled to summary judgment. See Mitchell v. General Data Corp., 12 F.3d 1310, 1316-17 (4th Cir. 1994). Here, the defendant has produced a legitimate, non-discriminatory reason for the failure to promote Brown: that she was not qualified to be promoted to "Nurse IV." Brown has not presented any evidence to show that the NPSB's finding that Brown "lack[ed] the nursing practice requirements

for consideration for promotion” was a pretext. The defendant is therefore entitled to judgment as a matter of law.

IV.

For the reasons stated, the court finds that plaintiff’s action should be dismissed with prejudice, pursuant to Rule 41(b), for failure to prosecute. In addition, the court finds that defendant is entitled to judgment as a matter of law, and therefore grants summary judgment for the defendant.

ENTER: This 12th day of November, 2004.

UNITED STATES DISTRICT JUDGE

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